
DATE: July 14, 1995
CASE NO. 93-ERA-42

IN THE MATTER OF

CHARLES A. WEBB,

COMPLAINANT,

v.

CAROLINA POWER & LIGHT COMPANY,

RESPONDENT.[1]

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

In this case arising under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. IV 1992), the Administrative Law Judge (ALJ) granted Respondent Carolina Power & Light Company's (CP&L) motion for summary decision and recommended dismissal of the complaint. I find that there are genuine issues of material fact and remand the complaint to the ALJ for further proceedings, including a hearing.

FACTUAL BACKGROUND[2]

CP&L had contractual arrangements with several firms to recommend personnel, including engineers, for hire as temporary contract workers. CP&L operates the Brunswick nuclear power plant in South Carolina.

Although he does not have an academic degree in engineering, Webb worked as a contract engineer in the nuclear industry for more than 20 years. He worked for CP&L almost continuously from April 1986 until November 1991, when he was laid off as the project on which he was working at the Brunswick plant was completed. Webb does not complain that his layoff was

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discriminatory. Rather, he alleges that CP&L has blacklisted him from being rehired as a nuclear engineer.

The Brunswick plant was shut down in April 1992 because of safety problems. Through media reports, Webb believed that CP&L was misleading the Nuclear Regulatory Commission (NRC) with regard to the time at which CP&L learned of the safety problems that led to the shutdown. Webb telephoned the NRC in late April of that year to report his impressions and subsequently made safety related allegations concerning CP&L. Webb asked the NRC to keep his contacts confidential and told only his wife about his cooperation with the NRC. The NRC inspected the Brunswick plant concerning the issues Webb raised.

After his layoff, Webb actively sought work in the nuclear industry through his own efforts and through "job shops" that provide employers with resumes of contract workers. The ALJ described Webb's job search as "relentless." Recommended Decision and Order (R. D. and O.) at 3. Aware that those who reported safety problems to the NRC sometimes experienced difficulty obtaining employment in the nuclear industry, Webb began keeping a journal concerning his job search.

In May 1992, Webb authorized Quantum, a job shop, to submit his resume to CP&L for a position as a civil/structural engineer, the same position Webb last had held at CP&L. The next month, Webb telephoned a CP&L supervisor, J.E. Harrell, and asked why he had not been rehired. Harrell said that there was no reason why Webb could not return and asked Webb to have his resume submitted again. However, in July, Quantum notified Webb that CP&L would consider only engineers with college degrees for the position.

The same month, Webb authorized Quantum to submit his resume for CP&L field engineer positions, which did not require an engineering degree. Quantum notified him that his resume was submitted for such positions, but he never heard whether he was selected. Quantum learned in October 1992 that CP&L had canceled the job order.

Webb also submitted his resume to friends working at CP&L for their aid in securing a position. In November 1992, Webb learned that his former supervisor, Richard Tripp, was making negative statements about the quality of his work to other CP&L personnel who had hiring authority. About four months later, Webb learned from the NRC about an employer "fingerprinting," or figuring out the identify of, an employee who made a safety complaint to that agency.

Webb filed this complaint on April 5, 1993. At the time CP&L filed the motion for summary decision, Webb still had not secured an engineering position, either with CP&L or elsewhere in the nuclear industry.

MOTION FOR SUMMARY DECISION

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Webb alleged that CP&L blacklisted him from employment in retaliation for his reports to, and cooperation with, the NRC. After the close of discovery, CP&L moved for summary decision on the ground that Webb's complaint was untimely filed. CP&L also contended that it was entitled to judgment as a matter of law on the merits of the complaint because "complainant cannot establish that CP&L had knowledge of [Webb's] protected activity. . . and cannot establish a *prima facie* case." Memorandum in Support of CP&L Motion for Summary Decision ("CP&L Mem.") at 16.

DISCUSSION

A motion for summary decision in an ERA case is governed by 29 C.F.R. § 18.40 and 18.41. *See, e.g., Trieber v. Tennessee Valley Authority, et al.*, Case No. 87-ERA-25, Sec. Dec. and Ord., Sept. 9, 1993, slip op. at 7-8. A party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 18 C.F.R. § 18.40(c).

Under the analogous Fed. R. Civ. P. 56(e), the non-moving party "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial . . . . Instead, the [party opposing summary judgment] must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-257 (1986). *See also, Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Carteret Sav. Bank, P.A. v. Compton, Luther & Sons, Inc.*, 899 F.2d 340, 344 (4th Cir. 1990). The non-moving party's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. *Bryant v. Ebasco Services, Inc.*, Case No. 88-ERA-31, Dec. and Order of Rem., July 9, 1990, slip op. at 4, citing *Liberty Lobby,* 477 U.S. at 247-252. "[W]here the non-moving party presents admissible direct evidence, such as through affidavits, answers to interrogatories, or depositions, the judge must accept the truth
of the evidence set forth; no credibility or plausibility determination is permissible." *Dewey v. Western Minerals, Inc.*, No. 90-35252, 1991 *U.S. App. LEXIS* 1399 (9th Cir. Jan. 29, 1991), *citing T.W. Elec. Serv. v. Pacific Elec. Contractor,* 809 F.2d 626, 631 (9th Cir. 1987).

On the other hand, if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact and the movant is entitled to summary judgment. *Celotex*, 477 U.S. at 322-323.

Timeliness

CP&L contends that Webb's complaint was untimely under

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either the 30-day filing limitation of ERA Section 210, or the 180-day limitation of Section 211. CP&L Mem. at 13. Section 2902 of the Comprehensive National Energy Policy Act of 1992 (CNEPA), enacted on October 24, 1992, amended ERA Section 210 by, *inter alia*, enlarging the time for filing a complaint to 180 days and renumbering Section 210 as Section 211. Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992).

CP&L argues that "[t]he undisputed facts indicate that there was no position filled by CP&L after June 15, 1992, for which Webb applied." CP&L Mem. at 14. The company argues that Webb knew by September 1992, at the latest, that he was not selected for engineering positions for which his resume had been submitted. The April 5 complaint was filed more than 180 days later.

At the outset, I find that the 180-day limitation applies. Subsection 2902(i) of the CNEPA provides:

> The amendments made by this section shall apply to claims filed under section 211(b) of the Energy Reorganization Act of 1974 (42 U.S.C. 5851(b)(1)) on or after the date of the enactment of this Act.

This complaint was filed in April 1993, well after the date of the CNEPA's enactment. *See Yule v. Burns Int'l Security Service,* Case No. 93-ERA-12, Final Dec. and Order, May 24,

1995, slip op. at 4.

Webb argues that the complaint was timely under the continuing violation theory because there were alleged incidents of discrimination that occurred within the 180 day limitation period. Webb Br. at 8. The Secretary has held that the timeliness of an ERA complaint may be preserved under the continuing violation theory "where there is an allegation of a course of related discriminatory conduct and the charge is filed within [one hundred and eighty] days of the last discriminatory act."[3] *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Final Dec. and Order, Sept. 17, 1993, slip op. at 13; *Garn v. Benchmark Technologies,* Case No. 88-ERA-21, Dec. and Order of Rem., Sept. 25, 1990, slip op. at 6. The continuing violation theory particularly applies to complaints of blacklisting because "there may be considerable lapse of time before a blacklisted employee has any basis for believing he is the subject of discrimination." *Egenrieder v. Metropolitan Edison Co.*, Case No. 85-ERA-23, Order of Remand, Apr. 20, 1987, slip op. at 8.

Webb contends that he filed the complaint within 180 days of learning that Tripp told other CP&L managers that he would not rehire Webb. Complainant's Reply to CP&L Motion for Summary Decision (Comp. Reply) at 8; Webb Affidavit (Aff.) at p. 7 Par. 20. Webb also contends the complaint is timely because he has

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never received notice of CP&L's decision not to hire him for

field engineering positions for which his resume was submitted. Comp. Reply at 9; Webb Aff. at 6, Par. 15 and 16.

According to Webb, Tripp told other CP&L managers that he would not rehire Webb because of poor performance. Webb. Aff. at 7-8, ¶ 20. But Tripp stated under oath that he did not communicate to anyone his decision that he would not rehire Webb. Tripp Dep., Vol. I at p. 91. I find that there is a disputed issue of fact concerning the alleged incident of blacklisting that occurred within the 180 day limitation period. I further find that the matter is material to the timeliness issue because a former supervisor's statement that he would not rehire a worker may be an instance of blacklisting. *See Beckett v. Prudential Ins. Co. of America*, No. 94-CV-8305 (SAS), 1995 U.S. Dist. LEXIS 6513 (S.D. N.Y. May 15, 1995) ("Poor recommendations . . . may be discriminatory practices if done in direct retaliation for a former employee's opposition to an unlawful employment practice."); *compare Smith v. Continental Ins. Corp.*, 747 F.Supp. 275, 281 (D. N.J. 1990), *aff'd*, 941 F.2d 1203 (3d Cir. 1991) (rejecting claim of blacklisting where plaintiff admitted she was unaware of any negative verbal or written job references to prospective employers).

In addition, there is a disputed issue concerning the time at which Webb knew, or should have known, that he was not selected for a field engineer position. Quantum employee Sharon George told Webb that she submitted his resume for field engineer positions with CP&L, and he never received word about the positions. Webb Aff. at 6, ¶ 15 and 16. George testified that she submitted Webb's resume on June 15, 1992 for a non-degreed field engineer position and she learned on October 20, 1992 that the job order was canceled. George Dep. at 34-42. Webb filed the compliant within 180 days of October 20, 1992. Therefore, the complaint would be timely unless Webb knew, or should have known, prior to October 12, 1992, the he was not selected for a field engineer position.[4] This is a question of fact not appropriate for determination pursuant to a motion for summary judgment.

Merits

The ALJ also granted summary judgment on the merits of the complaint. If, on remand, the ALJ finds that the complaint was timely filed, the issue of the summary decision on the merits will become relevant. Therefore I will consider the propriety of granting summary judgment on that ground.

The ALJ found fault because the Complainant did not establish that there exists "some document or other form of communication indicating that Webb should be denied employment, which CP&L has distributed to its hiring personnel or other

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employers in the nuclear industry." R.d. and O. at 7. However, Webb presented evidence that Tripp told other CP&L hiring personnel that he would not rehire Webb. Such a verbal statement made to hiring personnel can constitute blacklisting; no document or written list is required. *See, e.g., Holden v. Gulf States Utilities*, Case No. 92-ERA-44, Dec. and Remand Order, Apr. 14, 1995, slip op. at 3, 13 n.8 (remanding for a hearing on, *inter alia*, whether verbal statements providing "bad information" about the complainant to prospective employers

constituted blacklisting). I find there is no basis for granting summary decision because the alleged blacklisting consists of verbal statements.

An element of a *prima facie* case is establishing that the Complainant engaged in protected activities of which the Respondent was aware. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Final Dec. and Order, Feb. 15, 1995, slip op. at 11-12, *petition for review docketed*, No. 95-1729 (8th Cir. Mar. 27, 1995). The ALJ found that there was no genuine issue of material fact and that the relevant CP&L personnel were unaware that Webb made safety related reports to the NRC. R. D. and O. at 11. CP&L supported its motion with affidavits of the relevant personnel stating that they did not know that Webb had communicated with the NRC.

A complainant may make the required showing of a respondent's knowledge "either by direct or by circumstantial evidence." *Samodurov v. General Physics Corp.*, Case No. 89-ERA-20, Sec. Dec. and Order, Nov. 16, 1993, slip op. at 11. The ALJ found, however, that Webb's allegation that CP&L had knowledge of his protected activities was "based on assumptions and speculations." R.D. and O. at 11. I disagree.

The testimony in depositions and affidavits demonstrates that the attitudes of Webb's former supervisors changed shortly after Webb provided information to the NRC. Based on their prior observation of Webb's work, Harrell and Tripp agreed to hire Webb in August 1991 for the final outage he worked at Brunswick. Tripp Dep. at 1-52. In his affidavit, which must be accepted as true, Webb stated that Tripp told him in November 1991 that "there was no problem in [Webb's] returning for future outages." Webb Aff. at 3, Par. 8. Moreover, in June 1992, Harrell told Webb "that there was no reason why [he] could not return to work." *Id.*

Only one month later, in July 1992, Harrell stated that the lack of an engineering degree meant that Webb would not be rehired. Harrell Dep. at 40-41. And, contrary to Webb's affidavit, Tripp testified that he did not wish to rehire Webb. Tripp Dep. at 57, 91. Both Harrell and Tripp acknowledged that there were rumors at the plant about who might have contacted the

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NRC, although no one identified Webb as the focus of those rumors. Harrell Dep. at 62-63. In any event, soon after the NRC inspection, Harrell and Tripp reversed their positions on rehiring Webb.

One of CP&L's asserted reasons for not rehiring Webb is that he lacks an engineering degree. But the deposition testimony revealed that there was no company policy requiring engineers to have degrees because many of CP&L's field engineers did not have a degree. Harrell Dep. at 50 and Tripp Dep. at 67.

In *Trieber*, slip op. at 11, I approved the grant of summary decision to the respondent because the complainant submitted neither direct, circumstantial, nor inferential evidence of blacklisting. In contrast, Webb submitted an affidavit directly contradicting statements in the affidavits submitted by CP&L. In addition, there is circumstantial evidence indicating a suspicious change in position about rehiring Webb.

On the basis of the affidavits and depositions submitted in support of and in opposition to the motion, I find that there is a genuine issue of material fact concerning whether personnel, who were in a position to rehire Webb, either knew or suspected that he had reported safety concerns to the NRC.

There is no dispute that Webb engaged in protected activities when he contacted the NRC. The proximity in time between Webb's report to the NRC (April 1992) and the alleged incidents of blacklisting (from May through the autumn of 1992) is sufficient to raise the inference that his protected activities motivated the decision not to rehire him. Therefore, I will remand the complaint to the ALJ for further proceedings, including a hearing on the merits and a recommended decision.

CONCLUSION

The motion for summary decision is DENIED. The complaint is REMANDED to the ALJ for further proceedings consistent with this decision.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Webb also named Quantum Resources, Inc. (Quantum) as a respondent. I earlier approved the settlement agreement between Webb and Quantum and dismissed the complaint against Quantum. *Webb v. Quantum Resources, Inc.*, Case No. 93-ERA-42A, Sec. Order, June 29, 1994.

[2] I expressly make no findings of fact, but rather set forth Webb's allegations.

[3] *Thomas* was decided under ERA Action 210, which had a thirty day limitation period. The statement is equally true for cases under the 180 day limitation period of Section 211.

[4] October 12, 1992 is the one hundred eightieth day prior to the date Webb filed the complaint.